Supreme Court, U.S.
FILED
NOV 20 2002
OFFICE OF THE CLERK

No. 01-1187

IN THE

Supreme Court of the United States

NORCAL WASTE SYSTEMS, INC. and NORCAL WASTE SYSTEMS, INC. EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

Petitioners,

v.

JULIO ABRAHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JEROME B. FALK, JR.
Counsel of Record
BARBARA A. WINTERS
DOUGLAS A. WINTHROP
KEITH KESSLER
HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
A PROFESSIONAL CORPORATION
Three Embarcadero Ctr., 7th Fl.
San Francisco, CA 94111-4065
(415) 434-1600

PAUL J. ONDRASIK, JR.
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave., N.W.
Washington, DC 20005
(202) 429-3000

Counsel for Petitioner Norcal Waste Systems, Inc.

DEBORAH S. BALLATI
KAREN P. KIMMEY
FARELLA, BRAUN & MARTEL, LLP
235 Montgomery St.
San Francisco, CA 94110
(415) 954-4400

Counsel for Petitioner Norcal Waste Systems, Inc. Employee Stock Ownership Plan and Trust

STATEMENT PURSUANT TO RULE 29.6

Petitioner Norcal Waste Systems, Inc. set forth its corporate disclosure statement at page *ii* of its Petition for a Writ of Certiorari, and it has no amendments to that statement.

TABLE OF CONTENTS

Page

Statement Pursuant To Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

A. The Government All But Concedes That ERISA Preempts The Breach Of Fiduciary Duty Claim. 1

B. ERISA Completely Preempts The Claim As Well. 2

C. The Ninth Circuit's Complete-Preemption Analysis Conflicts With That of Other Circuits. 5

TABLE OF CITED AUTHORITIES

Cases	Page
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	3, 5
Bartholet v. Reishauer A.G. (Zurich), 953 F.2d 1073 (7th Cir. 1992)	7
Bldg. Trades Council (San Diego) v. Garmon, 359 U.S. 236 (1957)	4
Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)	3, 4
Dudley Supermarket, Inc. v. Transamerica Life Ins. & Ann. Co., 302 F.3d 1 (1st Cir. 2002)	10
Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)	3
Gieger v. Unum Life Ins. Co. of Am., 213 F. Supp. 2d 813 (N.D. Ohio 2002)	6-7
Guardsmark, Inc. v. Blue Cross & Blue Shield, 169 F. Supp. 2d 794 (W.D. Tenn. 2001)	7
Hull v. Fallon, 188 F.3d 939 (8th Cir. 1999)	9
Kalo v. Moen Inc., 93 F. Supp. 2d 869 (N.D. Ohio 2000)	7
Little v. UNUMProvident Corp., 196 F. Supp. 2d 659 (S.D. Ohio 2002)	7

Cited Authorities

Page

Martin v. Feilen, 965 F.2d 660 (1992) 10

Met. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) ... 2

Pegram v. Herdrich, 530 U.S. 211 (2000) 10

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) .. 4

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) ... 9

Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992) 6, 7, 8

Smith v. Provident Bank, 170 F.3d 609 (6th Cir. 1999) 6, 7

Statutes

Employee Retirement Income Security Act of 1974 § 502(a), 29 U.S.C. § 1132(a) 5

Labor-Management Relations Act of 1947 § 301, 29 U.S.C. § 185 3

29 C.F.R. 2509.94-2 2

Other Authorities

H. COMM. ON EDUC. & LABOR, H. REP. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639 .. 5

The Government all but concedes that the Ninth Circuit's major premise—that ERISA did not preempt the ESOP participants' breach of fiduciary duty claim against the ESOP fiduciaries—is wrong. Yet the Government argues that the decision need not be reviewed because its *other* holding—that the claim was not *completely* preempted—is correct. The Government cites no relevant authority to support its assertion, and it is mistaken. Both of the Ninth Circuit's rulings are wrong, and the issues merit review by this Court.

A. The Government All But Concedes That ERISA Preempts The Breach Of Fiduciary Duty Claim.

The Government concedes, as it must, that ERISA compels a plan fiduciary to "act solely in the interests of plan participants to the extent the fiduciary is making decisions . . . subject to ERISA's requirements." U.S. 12; Pet. 6, 11. ERISA preempts any state law that would impose different standards on an ERISA fiduciary's investment decisions.[1]

Respondents' breach of fiduciary duty claim would do just that. It asserts that the fiduciaries managing the ESOP owed a state law duty to *them*, as noteholders, to disapprove the disputed mergers because they would imperil respondents' payment on the notes. However, ERISA instructs fiduciaries that their *sole* concern in making investment decisions must be whether a proposed transaction is in the best interests of a plan and its participants. Thus, as the Government all but concedes, ERISA must preempt any state law that would *prohibit* plan fiduciaries from approving an investment transaction that their ERISA fiduciary duties *require* them to approve, because they find it to be in the best interests of the plan. U.S. 13-14 (noting conflict

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1. Parts of the Government's brief attack straw men, not contentions we have ever made. The brief notes that when plan fiduciaries do things like "investing in securities, leasing property, [or] lending money," they "are not free to ignore" generally applicable laws. U.S. 12. ERISA does not tell plan fiduciaries how to maintain a plan's real estate assets or make loans, so it cannot preempt local laws that do. But ERISA *does* supply the standards that govern fiduciaries' investment decisions.

with regulation requiring fiduciaries "'not [to] subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives'" (quoting 29 C.F.R. 2509.94-2)).

B. ERISA Completely Preempts The Claim As Well.

The ESOP participants could have sued (and *did* sue) the ESOP fiduciaries in federal court under ERISA for breaching their ERISA fiduciary duties. Pet. 9. But the participants also sued the fiduciaries in state court to challenge the same investment decisions under a state-law standard. This ERISA does not allow. Indeed, the whole point of complete preemption is to override any such attempt by a party with ERISA standing to challenge ERISA-regulated conduct in state court by suing in an alternate state-law "capacity."

Much of the Government's brief merely recapitulates the Ninth Circuit's view that plaintiffs *can* choose between suing in their ERISA or their state-law "capacities." *E.g.*, U.S. 9 (respondents "brought [their] claims in their capacities as former shareholders . . . and current note-holders"). Our Petition showed the error of that view. Pet. 12-16.

The Government also asserts a novel theory, for which it cites no relevant authority, that ERISA may preempt yet not completely preempt a plan participant's state law claim for breach of fiduciary duty against a plan fiduciary. Yet the Government also recognizes the guiding principle of complete preemption: "'Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character.'" U.S. 7 (quoting *Met. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987)). That is precisely what we have here: ERISA participants assert state-law claims challenging ERISA fiduciaries' investment decisions about plan assets. Because ERISA *exclusively* defines what a fiduciary must do and not do in managing plan assets, there is no more compelling example of a "particular area" Congress has "so completely pre-empt[ed]. . . ."

To support its theory that ERISA might preempt but not completely preempt such a claim, the Government notes that, "had the case been brought solely by the 103 [non–ESOP participants], it clearly would not be completely preempted." U.S. 9. That statement is true, but unhelpful. It merely illustrates the undisputed rule that ERISA completely preempts a claim only if the plaintiff is a party (participant, beneficiary, or fiduciary) whom Section 502(a) empowers to bring ERISA claims. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 26–27 (1983) ("*FTB*").

The Government also contends that *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), supports its theory (U.S. 10); it does not. *Caterpillar* concerned complete preemption under Section 301 of the Labor-Management Relations Act of 1947 ("LMRA"), which affords federal jurisdiction over any suit for violation of a collective bargaining agreement ("CBA"). Section 301 also completely preempts state-law claims; its preemptive force "is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." *FTB*, 463 U.S. at 23. The force of that preemption is matched by its focus: the sole touchstone of Section 301 preemption is whether a state-law claim requires a court to interpret a CBA. *See Caterpillar*, 482 U.S. at 394-95; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

In *Caterpillar*, plaintiff employees belonged to a bargaining unit subject to a CBA; they had previously had managerial jobs outside the CBA's scope, under individual employment contracts. 482 U.S. at 388-90. In suing Caterpillar in state court for breaching the latter, they avoided relying on the CBA. *Id.* at 394-95. But Caterpillar argued that the CBA superseded their individual contracts, so that their claims required interpretation of the CBA and were thus completely preempted by Section 301. *Id.* at 390.

The Court disagreed. It acknowledged that plaintiffs, as bargaining unit members, had "substantial rights under the [CBA] and could have brought suit under § 301"; however, "they chose not to." *Id.* at 395. The claims they did bring, for breach of individual contracts, did not "substantially depend[] upon interpretation of the [CBA]." *Id. Caterpillar* effectively holds that Section 301 *neither* preempted *nor* completely preempted the claims.[2] It thus does *not* support a theory that ERISA might preempt but not completely preempt claims by plan participants against plan fiduciaries.

In citing *Caterpillar*, the Government ignores the fact that, in passing Section 301, Congress occupied only *part* of the field of workplace relations. *See* 482 U.S. at 396 n.10. In passing ERISA, by contrast, Congress intended to "'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (citation omitted).

In fact, within the field of pension-plan regulation, Congress *especially* intended to occupy the subfield of fiduciary duties.

2. The Court did note that the National Labor Relations Act (NLRA) might preempt plaintiffs' claims without transforming them into claims arising under federal law and subject to removal. 482 U.S. at 397–98 & n.12. Contrary to the Government's suggestion (U.S. 11), that is *not* an example of a statute preempting yet not completely preempting a claim brought by a plaintiff with standing to sue under the statute. Unlike Section 301, which did not completely preempt *or* preempt the claims in *Caterpillar*, none of the NLRA preemption doctrines there at issue can entail complete preemption and removal, for the simple reason that state-law claims preempted by the NLRA cannot be heard in *any* court, as they concern matters committed to the jurisdiction of the NLRB. *See Bldg. Trades Council (San Diego) v. Garmon*, 359 U.S. 236, 244-45 (1957). There is no such thing as complete-preemption removal from state court to the NLRB. As for Section 301, *Caterpillar* says only that the affirmative defense that the CBA superseded the individual contracts could not warrant removal, although resolving that defense would require applying federal law to interpret the CBA. 482 U.S. at 398-99. In this case, the ESOP fiduciaries did not raise a *defense* requiring application of ERISA fiduciary standards, but showed that the ESOP participants' purported state-law *claims* can actually arise only under ERISA.

A primary goal of ERISA was to replace a welter of inconsistent state trust laws, whose application to pension plans was uncertain, with a uniform set of strict federal standards. *See* H. COMM. ON EDUC. & LABOR, H. REP. No. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, at 4641-46, 4649-51. Congress thus gave federal courts *exclusive* jurisdiction over claims for breach of ERISA fiduciary duties, as opposed to the *concurrent* jurisdiction it afforded over claims for improper denial of benefits (28 U.S.C. § 1132(a)), and had afforded in the LMRA over claims for violations of CBAs (*Lueck*, 471 U.S. at 209 n.5).

ERISA thus preempts any claim that would impose state-law duties on an ERISA fiduciary when deciding how to invest or manage plan assets. If the claim is made by a proper plaintiff, ERISA completely preempts it. Nothing in ERISA limits the scope of that complete preemption like Congress' desire, in passing Section 301, to preserve much of the States' power to regulate workplace relations.

C. The Ninth Circuit's Complete-Preemption Analysis Conflicts With That of Other Circuits.

Our Petition's main point is that the plaintiffs in the cited cases had distinct state-law relationships with the defendants (bank-depositor, employer/promisor-employee/promisee) at least as colorable as those asserted by the ESOP participants here (former shareholder–director, noteholder-obligor). But because those plaintiffs challenged *acts* done by defendants as part of their ERISA fiduciary or administrative roles, ERISA completely preempted their state-law claims, denying them the right to choose the "capacity" in which to sue.

The Government disagrees, arguing that even if a state-law claim (1) challenges an "act . . . governed solely by ERISA," (2) is subject to a preemption defense, and (3) is brought by an ERISA participant (4) against an ERISA fiduciary, the claim will escape complete preemption if it is based on "state-law rights . . . the origins of which predated and which remain independent of the rights [plaintiffs] later acquired as ESOP

participants." U.S. 11. The Government thus sees no circuit split, arguing that the claims in the cases we cite "arose from . . . relationship[s] governed by ERISA," not "pre-existing and independent state-law duties." *Id.* 17.

This attempt to explain away the circuit split fails. No Circuit has espoused the Government's unworkable and arbitrary "pre-existing and independent rights" rationale, and the Second Circuit's *Smith v. Dunham-Bush* opinion is flatly inconsistent with it. The Circuits whose opinions we cite rejected plan participants' invocation of state-law duties *not* because the duties were not "pre-existing and independent," but because the defendants did the *acts* at issue while performing ERISA fiduciary or administrative functions.

In discussing *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), the Government notes plaintiff's state-law claim "that a bank had breached a fiduciary duty under state law when it took stock out of the plaintiff's ERISA plan account." U.S. 17 (citing 170 F.3d at 612). It must then confront the holding that "[a] claim for breach of fiduciary duty against the fiduciary of an ERISA plan necessarily presents a federal question." 170 F.3d at 614. To avoid that holding's plain import, the Government simply adds a crucial word, contending the court "mean[t] only that a claim for breach of an *ERISA* fiduciary duty . . . necessarily presents a federal question." U.S. 18. Its reading is strained, for the very next sentence addresses "[Plaintiff's] *state-law* fiduciary duty claim." 170 F.3d at 614 (emphasis added). In fact, the entire paragraph concerns claims for breach of *state-law* duties that are recharacterized under ERISA. *Id.* at 613–14.

Even could one read the quoted passage as the Government urges, the conflict would remain. *Provident Bank* as a whole aggressively applies complete preemption to state-law claims for fiduciary breach. Pet. 20-22. Indeed, the case has already become a hornbook citation in the Sixth Circuit for an unqualified rule that ERISA completely preempts state law claims for breach of fiduciary duty. *See Gieger v. Unum Life*

Ins. Co. of Am., 213 F. Supp. 2d 813, 815 (N.D. Ohio 2002); *Little v. UNUMProvident Corp.*, 196 F. Supp. 2d 659, 666, 672 (S.D. Ohio 2002); *Guardsmark, Inc. v. Blue Cross & Blue Shield*, 169 F. Supp. 2d 794, 802 (W.D. Tenn. 2001); *Kalo v. Moen Inc.*, 93 F. Supp. 2d 869, 873 (N.D. Ohio 2000).

Nor does anything in *Provident Bank* suggest that the key issue is the *vintage* of the state-law relationship, *i.e.*, whether it "pre-dated" (U.S. 11) that under ERISA. Nor do the opinions we cited from the Third, Seventh, or Eighth Circuits mention this supposedly vital distinction. Even the Ninth Circuit never suggested that the age of respondents' state-law rights is what saved them from preemption. And *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992), squarely *refutes* any theory that a "pre-existing and independent rights" exception might harmonize the cases cited in our Petition. The state-law relationships in *Dunham-Bush*, employment and an oral promise, both predated—the former by decades—Smith's participation in the ERISA plan (*id.* at 7), yet ERISA completely preempted his claims. The facts of *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073 (7th Cir. 1992) (Easterbrook, J.), are basically the same.

Viewed in light of the "pre-existing rights" hypothesis, *Dunham-Bush* and this case have very similar facts. In each, plaintiff(s) had economic rights from a decades-long employment relationship—respondents' stock, and Smith's British pension. Their employers asked them to trade those rights for a set of new ones including (1) participation in an ERISA plan and (2) a promise of other funds (respondents' promissory notes, and Smith's promised additional benefits). Each brought state-law claims for breach of the promise (and in this case, a penumbral fiduciary relationship); defendants argued that the claims were completely preempted because they sought to apply state law to ERISA activities (making fiduciary investment decisions, and calculating benefits).

The Second Circuit agreed, noting the need for uniform plan administration, which requires courts to recharacterize

under ERISA's exclusive civil-enforcement scheme any claim that would apply state law to benefit claims. 959 F.2d at 10-11; *id.* at 12 n.5 (noting "particular danger to ERISA's policy of uniform regulation should a plan be subject to inconsistent or conflicting substantive [state] laws"). The court conceded that Smith's state-law relationship had not only predated but *led to* the ERISA relationship. But the need for uniformity made that a temporal distinction without a difference: "Although Smith may have been induced to relocate . . . [by] Dunham-Bush's unenforceable oral assurance, that does not significantly distinguish him from other . . . plan participants seeking to supplement their pension plans with orally promised benefits." *Id.* at 10. The facts of the case thus belie the Government's contention that "the state-law rights asserted in *Dunham-Bush*, unlike those in this case, arose directly from the employee's status as a plan participant." U.S. 19. Smith's state-law rights arose not from his status as plan participant, but from his pre-existing status as employee, and from the employer's prior promise.

Nor can the Government's "pre-existing rights" theory survive scrutiny on its merits. When plan participants sue in alternate capacities, using state law to impose on plan administrators and fiduciaries duties beside those imposed by ERISA, complete preemption ensures that their claims are recharacterized under ERISA's carefully balanced civil-enforcement scheme and resolved by federal courts experienced in applying that scheme. This spares plan fiduciaries from having to satisfy multiple duties when making investment decisions, and plan administrators from having to balance ERISA and state law in processing benefit claims.

Complete preemption thus secures the efficiency of uniform administration and, by minimizing their exposure to liability, preserves the willingness of employers to form, and individuals to manage, ERISA plans. A "pre-existing rights" exception would harm those goals by requiring plan administrators and fiduciaries to decide, case by case, when participants' state-law rights arose sufficiently prior to and independently of their

participation in a plan to entitle them to special treatment. That enterprise would serve no useful purpose, and its costs are obvious. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 107-08 (1983) ("[t]he administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan is apparent").

Those costs are most acute in cases, like this, that threaten personal liability for plan fiduciaries. A "pre-existing rights" exception would burden plan *administrators* by precluding uniformity in handling benefit claims, but the resultant problems could usually be resolved: some participants would receive greater benefits under state law, but the plan could still function (if it was not bankrupted). But the problems for plan *fiduciaries* in deciding how to invest and manage plan assets would often be, as in this case, *irresolvable*.

That is because a fiduciary must make binary investment choices on behalf of a plan as a whole. If ERISA dictates one choice, which best serves the interests of all participants *qua* participants, but state law dictates the opposite choice with regard to a subset of participants-with-preexisting-state-law-rights, the fiduciary faces a dilemma. This case is a fine example: the ESOP fiduciaries could not *approve* the disputed mergers on behalf of the non-noteholder participants and simultaneously *dis*approve them on behalf of the noteholder participants. They could only cause the ESOP to do one thing. Whichever they chose, they would be personally liable under ERISA or state law. That outcome is as inequitable for them as it is unworkable for the plan.

Finally, in trying to harmonize the other cases cited in our Petition, the Government asserts that the claims therein arose more "directly" from the ERISA than the state-law relationships. U.S. 19-20. These passages make no point not made by respondents and the Ninth Circuit.[3] The one new opinion the

3. In discussing *Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999), the Government does make a telling aside: "Nor did *Hull* question the Eighth (Cont'd)

Government cites in fact reinforces our view. *See Dudley Supermarket, Inc. v. Transamerica Life Ins. & Ann. Co.*, 302 F.3d 1 (1st Cir. 2002) (ERISA completely preempts claims against fiduciary investment advisor) (cited in U.S. 8 n.3). After noting that ERISA would completely preempt any state law claim that "in fact charged Transamerica with breach of fiduciary duty *while acting as an ERISA fiduciary*" (302 F.3d at 3 (emphasis added)), the court stated its methodology in terms that squarely contradict the Ninth Circuit's approach here: "A court must [determine] whether an entity acted in a fiduciary capacity with respect to the alleged wrongdoing not on the basis of a plaintiff's characterization of the activity but rather on the basis of the functions the entity performed and its relationship to the plaintiff." *Id.* at 5.

The Ninth and Fifth Circuits' opinions thus conflict with those cited in our Petition, which should be granted.

(Cont'd)

Circuit's prior recognition in *Martin v. Feilen*, 965 F.2d 660, 667 (1992) . . . that fiduciaries of an ESOP have both duties under ERISA and state-law duties as corporate stockholders." U.S. 19. This misreads *Feilen*, which in fact carefully applies to ESOP fiduciaries the principle of *Pegram v. Herdrich*, 530 U.S. 211 (2000): one may act at some times as an ERISA fiduciary and at others in a different capacity, but *each act* is subject to ERISA or to state law, not both. Pet. 13-14. The *Feilen* defendants were directors, controlling shareholders, and fiduciaries of the ESOP of a failed company. 965 F.2d at 662–64. The key issue was whether their ERISA fiduciary duties applied to their acts as directors or shareholders. *Id.* at 665. The Eighth Circuit's analysis echoes that of our Petition: after noting that "'ERISA does not prohibit an employer from acting in accordance with its interests as employer *when not administering the plan or investing its assets*,'" it held that ERISA fiduciary duties "attach only to *transactions that involve investing the ESOP's assets or administering the plan*." *Id.* at 665-66 (citations omitted; emphases added). In reviewing the record, the court carefully *avoided* holding that defendants had had both ERISA and state-law fiduciary duties in any one transaction. *E.g.*, *id.* at 666–67.

Respectfully submitted,

JEROME B. FALK, JR.
Counsel of Record
BARBARA A. WINTERS
DOUGLAS A. WINTHROP
KEITH KESSLER
HOWARD, RICE, NEMEROVSKI,
CANADY, FALK & RABKIN
A PROFESSIONAL CORPORATION

PAUL J. ONDRASIK, JR.
STEPTOE & JOHNSON, LLP
Counsel for Petitioner
Norcal Waste Systems, Inc.

DEBORAH S. BALLATI
KAREN P. KIMMEY
FARELLA, BRAUN & MARTEL

Counsel for Petitioner
Norcal Waste Systems, Inc.
Employee Stock Ownership
Plan and Trust